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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER SESSION, 1956.

No. 396

C. S. DONAHOO (Plaintiff), PETITIONER,

VS.

GUY A. THOMPSON, Trustee of the MISSOURI PACIFIC RAILROAD COMPANY, a Corporation, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI, SUGGESTIONS WHY WRIT SHOULD BE GRANTED AND APPENDIX "A."

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INDEX

Summary and Short Statement 2

Jurisdiction 2

The Questions Presented Are Substantial 8

Opinions Below 9

Questions Presented for Review 9

Statutes Involved 9

Reasons Relied On for Allowance of the Writ 10

Suggestions Why Writ Should Be Granted 11

Appendix—

Opinion of Supreme Court A1

Cases Cited

Adam v. Saenger, 303 U. S. 59, 82 L. Ed. 649 ..... 26, 27

Amalgamated Ass'n, etc., v. Pennsylvania Greyhound Line, 192 F. 2d 310, 313, 3d Circuit 24-25

Ancient Egyptian Arabic Order, N. M. S., v. Michaux, 279 U. S. 737, 746, 73 L. Ed. 931 28

Angel v. Bullington, 330 U. S. 183, 189, 91 L. Ed. 832, 836 ..... 3, 4

Awotin v. Atlas Exchange Nat'l Bank, 295 U. S. 209, 79 L. Ed. 1393, 1398 6

Bailey v. Central Vermont Ry. Co., 319 U. S. 350, 352, 87 L. Ed. 1444, 1446 16

Beattie Mfg. Co. v. Clark, 298 Mo. 98, 106 S. W. 29 30

Boseman v. Conn. Gen. Life Ins. Co., 301 U. S. 196, 81 L. Ed. 1036 17

Canton Cotton Mills v. Bowman Overall Co., 149 Tenn. 18, 257 S. W. 398 21

J. I. Case Co. v. N. L. R. B., 321 U. S. 332, 88 L. Ed. 762 ..... 17, 22, 23, 24
Central Power Co. v. City of Kearney, 274 Fed. 253 21
Clegg v. Brannon, 111 Tex. 367, 234 S. W. 1076 21
Cole County v. Central Missouri Trust Co., 302 Mo. 222, 257 S. W. 774 21
Coleman Hotel Co. v. Crawford, 3 S. W. 2d 1109, 1111 30
Craig v. Thompson, Mo. Sup., 244 S. W. 2d 37 24
Crone v. Stinde, 156 Mo. 262, 55 S. W. 863 30
Doucette v. Vincent, 194 F. 2d 834, 846 4
Dubuque & Sioux City Railway Co. et al. v. Richmond et al., 82 U. S. 9, 21 L. Ed. 118 6
Emery Bros. v. Mutual Benefit Oil Co., 73 Okla. 94, 175 Pac. 210 21
Frost & Co. v. Couer D'Alene Mines Corp., 312 U. S. 38, 85 L. Ed. 503 5
Gatliff Coal Co. v. Cox, 142 F. 2d 876 25
General Life Ins. Co. v. Boseman, 54 F. 2d 701, affirmed in 301 U. S. 196, 81 L. Ed. 1036 21
Hammerstein v. Superior Court of Calif., 340 U. S. 622, 95 L. Ed. 586 3
Harper v. Local Union, L. B. E. W., 48 S. W. 2d 1033 31
Herb v. Pitcairn, 324 U. S. 117, 89 L. Ed. 789, 798 7
Indiana ex rel. Anderson v. Brand, 303 U. S. 95, 82 L. Ed. 685, 690 28
Jerome v. United States, 318 U. S. 100, 87 L. Ed. 642 15
Kennon v. Brooks Scanlon Co., 148 La. 120, 86 So. 675 21
L. & N. Ry. Co. v. Layton, 243 U. S. 616, 61 L. Ed. 931 7
Louritzen v. Larsen, 345 U. S. 571, 588, 97 L. Ed. 1254 19
Maisel v. Sigman, 205 N. Y. S. 807 31
Montana-Dakota Utility Co. v. Northeastern P. S. C., 341 U. S. 246, 95 L. Ed. 924 7
National Labor Relations Board v. Hearst Publications, 322 U. S. 111, 88 L. Ed. 1170 12
Petty v. Railroad, 205 Ark. 990, 167 S. W. 2d 895 28
Railroad v. Matthews, 64 Ark. 398, 42 S. W. 902 28

Railway Employes' Department, etc., v. Hanson, 100 L. Ed. (Adv. Sheets) 633 17
Railsback v. Raines, 110 Kan. 220, 203 Pac. 687 21
St. Louis, I. M. & S. v. Matthews, 64 Ark. 398, 42 S. W. 903 21
San Jose Land Co. v. San Jose Ranch Co., 189 U. S. 177, 47 L. Ed. 765 5
Santa Fe v. Smith, 132 Pac. 494 21
Seaboard Airline Ry. Co. v. Horton, 233 U. S. 492, 503, 58 L. Ed. 1062, 1069 15
Sigfred v. Pan American World Airways, 230 F. 2d 13, 17 14
Sola Elec. Co. v. Jefferson Elec. Co., 317 U. S. 173, 177, 87 L. Ed. 165, 168 16
Titus v. Wallick, 306 U. S. 282, 292, 83 L. Ed. 653, 659 3, 4
United Electrical Workers v. Miller Metal Products, Inc., 215 F. 2d 221 25
Weber Engine Co. v. Lehrach, 262 S. W. 457 (Mo.) 30
Western v. Olathe State Bank, 71 Colo. 102, 204 Pac. 329 21
Wilson v. Lewiston Mill Co., 44 N. E. 959, 961, 150 N. Y. 314 12

STATUTES AND TEXTS

18 A. L. R. 2d 361 29
81 A. L. R. 1279 30
81 A. L. R. 1286 30
95 A. L. R. 10, pp. 34-5 3
15 C. J. S. 830 12
17 C. J. S. 336, 343 19
Grismore on Contracts, Sec. 68, Page 121 ..... 31, 32
Section 490.080 of Missouri Statutes, V. A. M. S. 1949 26
Story on Conflict of Laws, 8th Ed., p. 38 12
Title 28, U. S. C. A., Sec. 1257 (3) 2, 3, 4
U. S. C. A., Title 45, Section 151 et seq. 2, 9, 10, 17

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No. .....

C. S. DONAHOO (Plaintiff), PETITIONER,

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GUY A. THOMPSON, Trustee of the MISSOURI PACIFIC RAILROAD COMPANY, a Corporation, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI.

TO THE HONORABLE, THE CHIEF JUSTICE, AND THE ASSOCIATE JUSTICES, OF THE SUPREME COURT OF THE UNITED STATES:

C. S. Donahoo, Plaintiff in the above entitled case, by his attorneys, respectfully petitions that a Writ of Certiorari issue to review the judgment of the Supreme Court of Missouri entered in this case on May 14, 1956.

SUMMARY AND SHORT STATEMENT.

This is an action for wrongful discharge from a contract of employment made pursuant to the Railway Labor Act, enacted by Congress. This statute appears in U. S. C. A., Title 45, Section 151, *et seq.*, and authorizes collective bargaining between carriers and a representative of the employees of a class, usually a union. The purpose of this federal statute is: "To avoid any interruption to commerce or to the operation of any carrier engaged therein;" Sec. 151a. Contracts, when made, define the rights, duties and privileges of all employees in that class. While plaintiff was working for defendant as a conductor, a collective bargaining agreement was entered into between the defendant railroad and the union of which plaintiff was a member, which contained, among other provisions, a stipulation that no conductor should be discharged except for good and sufficient cause, and then only after a fair and impartial trial. Plaintiff continued to work under this collective agreement until he was discharged on October 15th, 1952. Alleging that his discharge was wrongful, plaintiff filed suit in the state court of Missouri where, upon a trial, plaintiff recovered judgment for $18,500.00. Upon appeal to the Supreme Court of Missouri, this judgment was reversed outright, and judgment entered for defendant. 291 S. W. 2d 70.

JURISDICTION.

The judgment of the Supreme Court of Missouri in this case was entered May 14, 1956. The jurisdiction of this court is invoked under Title 28, U. S. C. A., Sec. 1257 (3). Collective bargaining agreements entered into pursuant to Railway Labor Act create and define rights,

privileges and immunities federal in their nature. The right of plaintiff, working under such a contract, to remain in the service of the carrier and not be subjected to discharge except for good and sufficient reasons, and then only after a fair trial, is a federally created right, privilege or immunity, of which he was wrongfully deprived by the Supreme Court of Missouri in the reversal of the judgment in his favor. Collective bargaining contracts were unknown at common law. 95 A. L. R. 10, pp. 34-5 (anno). They exist by reason of statute, in this case a federal statute, the Railway Labor Act. This court has jurisdiction to review such a judgment under Section 1257 (3) of Title 28, U. S. C. A. *Angel* v. *Bullington,* 330 U. S. 183, 189, 91 L. Ed. 832, 836; *Titus* v. *Wallick,* 306 U. S. 282, 292, 83 L. Ed. 653, 659; *Hammerstein* v. *Superior Court of California,* 340 U. S. 622, 95 L. Ed. 586.

The facts alleged in plaintiff's petition disclosed that he was relying on a violation of rights federally created (Tr. 4, 5). It was strongly urged in the Missouri Supreme Court, both in plaintiff's brief and in his motion for rehearing, that he was relying upon federally created rights. The Missouri Supreme Court said in its opinion:

> "The plaintiff urges, since his cause of action is based in part upon a collective bargaining agreement between the railroad and the Brotherhood of Railroad Conductors, that his rights and cause of action arise under and are 'federally created rights' and that those rights may not be denied or defeated by the laws of any state."

And in holding against plaintiff on this contention, the opinion recites:

> "* * * the fact is that his employment contract is an Arkansas contract and his action, consequently, is governed by the substantive law of Arkansas."

In *Angel* v. *Bullington, supra,* it is said l. c. 836:

> "Whether the claims are based on a federal right or are merely of local concern is itself a federal question on which this court, and not the Supreme Court of North Carolina, has the last say * * * When an asserted federal right is denied, the sufficiency of the grounds of denial is for this court to decide."
>
> *Titus* v. *Wallick,* 306 U. S. 282, 291, 83 L. Ed. 653, 659.

The right, title, privilege or immunity under the laws of the United States, referred to in Section 1257 (3) of 28 U. S. C. A. may be set up at any stage of the litigation.

Doucette v. *Vincent,* 194 F. 2d 834, 846.

Plaintiff contends, and defendant denies, that his rights allegedly violated, were federally created; that is, they arose out of the collective agreement executed pursuant to federal law—the Railway Labor Act. The final decision on this question rests with this court. That alone gives this court jurisdiction of the cause.

Pertinent to the question of jurisdiction we refer the court to petitioner's brief herewith on the question that his rights are federally created.

This court has jurisdiction to review the judgment of the Missouri Supreme Court.

If plaintiff's rights, for violation of which he sues in this case, are federal in their nature, then this court has jurisdiction.

There was no such thing at common law as a collective bargaining contract. Each employee's time of service, as well as his duties and wages, depended entirely upon his individual contract with the carrier. He could be discharged at will, either with or without cause. Congress

sought to remedy this situation, by enacting the Railway Labor Act and thereby avoid further interruption to interstate commerce. The combined strength of the united employees was thrown into the negotiations and new rights and immunities to the employees resulted. These are reflected in the Railway Labor Act, and in contracts made pursuant thereto. Among them was the right not to be discharged except for good and sufficient cause, and then only after a fair trial. This was a right and immunity not theretofore enjoyed by the employees. By reason of the Act this provision was inserted in the collective agreement. Hence, this provision had its origin in this federal statute, and all rights conferred on the employees in the collective agreement, and now enjoyed by them, exist solely and only by reason of the Railway Labor Act. For this reason we think it is proper and fitting to refer to these rights as federal rights.

Plaintiff in his petition referred to the collective agreement and urged throughout the case that it was for a violation of his federal rights he was suing. Even though this had not been done, it is sufficient to warrant a review by this court that this question was fully reviewed by the State Supreme Court, and it was in this case (See opinion in appendix), and decided against plaintiff.

San Jose Land Co. v. *San Jose Ranch Co.*, 189 U. S. 177, 47 L. Ed. 765.

In the following cases this court granted certiorari and dealt with rights and immunities growing out of the execution of contracts under federal requirements.

A. C. Frost & Co. v. *Couer D'Alene Mines Corp.*, 312 U. S. 38, 85 L. Ed. 503, involved the legality of a contract for the sale of shares of stock of the Mining Company. One defense was that the contract was entered into in

violation of law, and particularly in violation of the Securities Act passed by Congress. The state court had interpreted the contract in a certain way. In granting certiorari, this court said:

> "Thus a federal question arose which demands determination."

Awotin v. *Atlas Exchange National Bank*, 295 U. S. 209, 79 L. Ed. 1393, 1398, involved the legality of certain provisions of a contract made with a National Bank. This court said:

> "We have jurisdiction of the cause to review the rulings of the state court that the express contract was rendered invalid by the federal statute."

The Dubuque & Sioux City Railway Co. et al. v. *Richmond et al.*, 82 U. S. 9, 21 L. Ed. 118, was a suit for breach of contract, in which judgment for plaintiff was affirmed. One defense was that certain act of Congress authorizing the construction of certain bridges and to facilitate certain military and postal communications rendered the contracts void and unenforceable. The court said:

> "The defendants in error move to dismiss the writ on the ground that the 'record does not show a state of facts that makes the Act of Congress apply to the case.' The record does show, however, that the present plaintiffs in error claimed in the state court, that contracts made with the defendant in error had been rendered void and of no force and effect by provisions of the Constitution of the United States and of certain Act of Congress * * * and also that the Supreme Court of Iowa denied this claim. The motion to dismiss must, therefore, be denied."

In the case at bar the Supreme Court of Missouri not only construed and interpreted the collective agreement,

under which plaintiff claims to have acquired certain rights federal in their nature, and determined all questions under state laws, but further denies that plaintiff acquired any such rights because not specifically granted. The opinion states:

> "The first difficulty with respondent's basic position is that he does not point to any specific section of the Railway Labor Act, or to any other federal act concerning labor unions and union contracts, creating personal rights or personal causes of action."

This court has many times held that no specific provision is necessary to confer a cause of action where there has been a disregarding of a statute, or the provisions of a contract, or a wrong, stating in *Montana-Dakota Utility Co.* v. *Northeastern P. S. C.*, 341 U. S. 246, 95 L. Ed. l. c. 924:

> "If civil liability is appropriate to effectuate the purpose of a statute, courts are not denied the traditional remedy because it is not specifically authorized."
>
> *Herb* v. *Pitcairn*, 324 U. S. 117, 89 L. Ed. 789, 798.
>
> *L. & N. Ry. Co.* v. *Layton*, 243 U. S. 616, 61 L. Ed. 931.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL.

The questions presented to this court are substantial questions and disclose the errors committed by the Missouri Supreme Court in deciding this case.

First. The Missouri Supreme Court erred in holding that no federal question is involved, and, in effect, that no rights were acquired by the employees under this collective contract.

Second. The court erred in holding that the contract of employment was an Arkansas contract and governed by the substantive laws of that state.

Third. The court erred in holding that under the laws of Arkansas and because of the Supreme Court decisions of that state, plaintiff had no cause of action for wrongful discharge and could not recover in this action in Missouri. All this was erroneously based on Arkansas decisions that the provision in the collective agreement against discharge was unilateral and lacked mutuality. We here refer the court to petitioner's brief that this doctrine of mutuality has no application to contracts for the benefit of persons not parties to the contract.

Two tragedies have been committed in this case:

First, State, rather than federal law, was applied.

Second, and probably the worst: the state law of Arkansas used to defeat this action has no application to this case.

OPINIONS BELOW.

The opinion of the Supreme Court of Missouri was in division and appears in 291 S. W. 2d 70. Following this opinion plaintiff timely filed a motion for rehearing of the cause, or in the alternative, to transfer the cause to court, *en banc*, for rehearing by the entire court. Both said motions were over-ruled by the court on June 11, 1956, and judgment was rendered for defendant notwithstanding the verdict. Hence, the judgment by the Supreme Court of Missouri became and now is a final judgment. Copy of said opinion appears as appendix "A" to this petition.

QUESTIONS PRESENTED FOR REVIEW.

1. Whether or not a provision of a collective bargaining agreement entered into by the carrier and a representative of the conductors pursuant to Railway Labor Act, is void and unenforceable, because of decisions of a state court that such provision is unilateral and lacks mutuality.

2. Whether or not a collective agreement entered into by the carrier and conductors pursuant to Railway Labor Act, and the validity of its provisions, is governed by federal or by state law.

3. Whether the rights, privileges and immunities arising under and growing out of such collective agreement are federally created; or are of a purely local nature.

STATUTES INVOLVED.

The Railway Labor Act, Title 45, Ch. 8, Sec. 151 *et seq.*, Volume, Railroads, p. 461, provides among other things:

"Sec. 152. First. It shall be the duty of all carriers, their officers, agents and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof."

* * *

"Fourth. Employees shall have the right to organize and bargain collectively through representative of their own choosing * * *." etc.

* * *

"Tenth * * * That nothing in this chapter shall be construed to require an individual employee to render labor or services without his consent, nor shall anything in this chapter be construed to make the quitting of his labor by an individual employee an illegal act;" etc.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

Plaintiff sues for breach of contract provision against discharge. This provision appears in the collective agreement—is a part of it. He does not complain of any violation of his contract of individual hiring. Therefore, any rights violated by the alleged breach, arose out of the collective agreement. This appears from plaintiff's petition (Tr. 4, 5). The agreement was made before the Railway Labor Act but continued in force after passage thereof (Tr. 123). The decision of the case, therefore, called for a construction of the collective agreement, the interpretation and meaning of the Act, and its provisions

relative to working conditions in at least eight states in which the defendant operated. The confusion which would result by applying local law to the validity and meaning of the collective agreement is apparent. It is petitioner's contention that local state law is not applicable to this case, but that the case is governed by provisions of the Railway Labor Act, and federal laws applicable thereto so as to give to said collective agreement a uniform application in all states through which defendant operates.

The authority to enter into the collective agreement in this case had its origin in the statutes of the United States and was in no way dependent on the laws of Arkansas or any other state. The duties imposed upon the defendant and the rights acquired by it and the employees as a result of the collective agreement find their roots in the same federal source, to-wit, the Railway Labor Act.

We respectfully submit that certiorari issue to the Supreme Court of Missouri for review of their judgment in this case.

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SUGGESTIONS WHY WRIT SHOULD BE GRANTED.

Certiorari should be granted in this case, because plaintiff's rights violated by defendant were federally created rights and are not to be determined by state law. The

collective agreement and the rights of employees arising under it have their roots in the Railway Labor Act.

I.

What Law Is Applicable?

In *Story on Conflict of Laws,* 8th Ed., p. 38, it is said:

> "The rights of parties depend partly on the circumstances of the transaction, and partly on the law which gave the transaction its force and effect. It would be as unjust to apply a different law, as it would be to determine the rights of the parties by a different transaction." 15 *C. J. S.* 830, Note.

In *Wilson* v. *Lewiston Mill Co.,* 44 N. E. 959, 961, 150 N. Y. 314, it is said:

> "It has been well stated, the question of what law applies must be determined with reference to the facts and circumstances surrounding the parties, so far as it is disclosed, must control."

National Labor Relations Board v. *Hearst Publications,* 322 U. S. 111, 88 L. Ed. 1170, is analogous here. That was a proceeding on behalf of news boys to enforce an order of the Board made in accordance with the provisions of a collective agreement with the newspaper. The paper defended on the ground that the news boys were not "employees" within the meaning of the Labor Act, and contended that this question should be settled in accordance with California law where the contract was made and the suit was brought. The Circuit Court of Appeals so held, and in reversing that decision the Supreme Court of the United States says (l. c. 1180):

> "Two possible consequences could follow. One would be to refer the decision of who are employees to local state law. The alternative would be to make

it turn on a sort of pervading general essence distilled from state law. Congress obviously did not intend the former result. It would introduce variations into the statute's operation as wide as the differences the forty-eight states and other local jurisdictions made in applying the distinction for wholly different purposes. Persons who might be 'employees' in one state would be 'independent contractors' in another. They would be within or without the statute's protection depending not on whether their situation falls factually within the ambit Congress had in mind, but upon the accidents of the location of their work and the attitude of the particular local jurisdiction in casting doubtful cases one way or the other. Persons working across state lines might fall in one class or the other, possibly both, depending on whether the Board and the courts would be required to give effect to the law of one state or of the adjoining one, or to that of each in relation to the portion of the work done within its borders.

"Both the terms and the purposes of the statute, as well as the legislative history, show that Congress had in mind no such patchwork plan for securing freedom of employees' organization and of collective bargaining. The Wagner Act is federal legislation, administered by a national agency, intended to solve a national problem on a national scale. Cf. *e. g.*, Sen. Rep. No. 573, 74th Cong. 1st Sess. 2-4. It is an Act, therefore, in reference to which it is not only proper, but necessary for us to assume, 'in the absence of a plain indication to the contrary, that Congress * * * is not making the application of the federal act dependent on state law.' *Jerome* v. *United States*, 318 U. S. 101, 104, 87 L. Ed. 640, 643, 63 S. Ct. 483. Nothing in the statute's background, history, terms or purposes indicates its scope is to be limited by such varying local conceptions, either statutory or judicial, or that it is to be administered in accordance with whatever different standards the respective states may see fit to adopt for the disposition of unrelated, local prob-

lems. Consequently, so far as the meaning of 'employee' in this statute is concerned, 'the federal law must prevail no matter what name is given to the interest or right by state law.'

* * *

"* * * Congress had in mind a wider field than the narrow technical legal relation of 'master and servant,' as the common law had worked this out in all its variations, and at the same time a narrower one than the entire area of rendering service to others. * * *.

"Congress was not seeking to solve the nationally harassing problems with which the statute deals by solutions only partially effective. It rather sought to find a broad solution, one that would bring industrial peace by substituting, so far as its power could reach, the rights of workers to self-organization and collective bargaining for the industrial strife which prevails where these rights are not effectively established. Yet only partial solutions would be provided if large segments of workers about whose technical legal position such local differences exist should be wholly excluded from coverage by reason of such differences. Yet that result could not be avoided, if choice must be made among them and controlled by them in deciding who are 'employees' within the Act's meaning. Enmeshed in such distinctions, the administration of the statute soon might become encumbered by the same sort of technical legal refinement as has characterized the long evolution of the employee-independent contractor dichotomy in the courts for other purposes. The consequences would be ultimately to defeat, in part at least, the achievement of the statute's objectives. Congress no more intended to import this mass of technicality as a controlling 'standard' for uniform national application than to refer decision of the question outright to the local law."

In the recent case of *Sigfred* v. *Pan American World Airways*, 230 F. 2d 13, 17, 5th Cir., it is said:

"It becomes plain upon a moment's reflection that such a system (application of the Florida law) would completely sweep aside Congress' efforts to provide for a prompt and orderly settlement of labor disputes * * *.

"It would rest the effectiveness of the statutory plan upon the variegated characteristics of state law, etc. * * *.

"Congress having required the negotiation of collective bargaining agreements, * * * we deem it a reasonable corollary thereto that it intended that the scope of review in appeals * * * should be determined by federal courts, applying federal law."

In *Jerome* v. *United States*, 318 U. S. 100, 87 L. Ed. 642, it is said:

"We must generally assume, in the absence of a plain indication to the contrary, that Congress when it enacts a statute is not making the application of the federal act dependent on state law. That assumption is based on the fact that the application of federal legislation is nation-wide (*United States* v. *Pelzer*, 312 U. S. 399, 402, 85 L. Ed. 913, 915, 60 S. Ct. 659), and at times on the fact that the federal program would be impaired if state law were to control (Citing)."

In *Seaboard Airline Ry. Co.* v. *Horton*, 233 U. S. 492, 503, 58 L. Ed. 1062, 1069, in speaking of language used in the Federal Employers' Liability Act, this court said:

"By the phrase 'any statute enacted for the safety of employees,' Congress evidently intended Federal Statutes, such as the safety appliance acts, * * *. For it is not to be conceived that, in enacting a general law for establishing and enforcing the responsibility of common carriers by railroad to their employees in interstate commerce, Congress intended to permit the

legislatures of the several states to determine the effect of contributory negligence and assumption of risks by enacting statutes for the safety of employees, since this would, in effect, relegate to state control two of the essential factors that determine the responsibility of employers."

In following this rule of construction, this court, in *Bailey* v. *Central Vermont Ry. Co.*, 319 U. S. 350, 352, 87 L. Ed. 1444, 1446, in speaking further of the FELA, said:

"The rights which the Act creates are federal rights protected by federal, rather than by local rules, of law."

In *Sola Elec. Co.* v. *Jefferson Elec. Co.*, 317 U. S. 173, 177, 87 L. Ed. 165, 168, this court said:

"It is familiar doctrine that the prohibition of a federal statute may not be set at naught, or its benefits denied, by state statutes or state common law rules. In such a case our decision is not controlled by *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, 82 L. Ed. 1188, 58 S. Ct. 817, 114 A. L. R. 1487. There we followed state law because it was the law to be applied in the federal courts. But the doctrine of that case is inapplicable to those areas of judicial decision within which the policy of the law is so dominated by the sweep of federal statutes that legal relations which they affect must be deemed governed by federal law having its source in those statutes, rather than by local law. *Royal Indem. Co.* v. *United States*, 313 U. S. 289, 296, 85 L. Ed. 1361, 1366, 61 S. Ct. 995; *Prudence Realization Corp.* v. *Geist*, 316 U. S. 89, 95, 86 L. Ed. 1293, 1298, 62 S. Ct. 978, 48 Am. Bankr. Rep. (N. S.) 695; *Jackson County* v. *United States*, 308 U. S. 343, 349, 350, 84 L. Ed. 313, 316, 317, 60 S. Ct. 285; cf. *O'Brien* v. *Western U. Teleg. Co.*, (C. C. A. 1st) 113 F. 2d 539, 541. When a federal statute condemns an act as unlawful, the extent and nature of the legal consequences of the condemnation, though left by the statute to judicial determination, are never-

theless federal questions, the answers to which are to be derived from the statute and the federal policy which it has adopted. To the federal statute and policy, conflicting state law and policy must yield * * *."

One of the first provisions in the *Railway Labor Act*, Sec. 151, is:

> "The purposes of the chapter are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein;"

Congress' authority to so legislate is conferred by the interstate nature of the subject. Congress never contemplated that the validity or effect of its legislation, or the validity or effect of a contract made pursuant thereto, would depend upon state law. Also see *Railway Employes Department, etc.*, v. *Hanson*, 100 L. Ed. (Adv. Sheets) 633.

An analogous case on the facts is *Boseman* v. *Conn. Gen. Life Ins. Co.*, 301 U. S. 196, 81 L. Ed. 1036, as to what law is applicable in the case at bar. This case recognizes that:

> "* * * the purpose of the parties to the contract that everywhere it will have the same meaning and give the same protection and that inequalities and confusion liable to result from applications of diverse state laws shall be avoided."

We say, analogous, because the U. S. Supreme Court, in speaking of the collective agreement in *J. I. Case Co.* v. *N. L. R. B.*, 321 U. S. 332, 88 L. Ed. 762, 767, said:

> "Without pushing the analogy too far, the agreement may be likened to the tariffs established by a carrier, to standard provisions prescribed by supervising authorities for insurance policies, or to utilities schedules of rates and rules for service," etc.

The Boseman case involved the question of whether the law of Pennsylvania, where the group policy was issued, governed, or whether the law of Texas where the certificate was issued to the plaintiff. *q. v.*

II.

Another reason why certiorari should be granted is: It is apparent that the parties to the collective agreement, expressly and by inference from all the circumstances, intended that federal, rather than state law, should control their agreement.

The Missouri Supreme Court, in its opinion, states:

> "But, upon this record, the fact is that his (petitioner's) contract of employment is an Arkansas contract and his action, consequently is governed by the substantive law of Arkansas. Under the law of Arkansas, Mr. Donahoo would not be entitled to recover in this action."

Following is cited a list of Arkansas cases which denied recovery because the Supreme Court of that state held a similar collective bargaining agreement, not to discharge an employee without good and sufficient reason, was unilateral, and, consequently, void. Because of this holding in Arkansas, the Missouri Supreme Court denied recovery in this case; and this denial is based on the false premise that the law of Arkansas governs the validity and enforceability of the collective agreement. The collective agreement was entered into in Missouri (Tr. 123), while petitioner was hired in Arkansas. He was to work for defendant, and did work for it in Oklahoma, Kansas and Arkansas. The contract was, therefore, to be performed in many different states. Hence the rule that the law of the place of making the contract applied, cannot govern in this case. Neither can the rule that the law of the place of

performance applies, because performance was to be had in different states.

The intention of the parties should control as to applicable law.

In *Louritzen* v. *Larsen*, 345 U. S. 571, 588, 97 L. Ed. 1254, 1271, this court said:

> "Except as forbidden by some public policy, the tendency of the law is to apply in contract matters the law which the parties intended to apply. We are aware of no public policy which would prevent the parties to this contract, which contemplates performance in a multitude of territorial jurisdictions and on the high seas, from so settling upon the law of the flag-state as their governing code."

The correct rule to be applied in this case is that stated in 17 *C. J. S.* 336, as follows:

> "In many cases it is held as a general rule that a contract is governed as to its intrinsic validity, construction and effect by the law with reference to which the parties intended, or fairly may be presumed to have intended, to contract * * *."

And again, on page 343, where there is to be performance in several states, it is said:

> "* * * the better rule would seem to be that the presumed intention of the parties, gathered from the attending circumstances, is to be taken as controlling."

Therefore, if it can be ascertained from all the attending circumstances surrounding the execution of the collective bargaining agreement in this case what law the parties intended should apply and under what law the parties may be presumed to have intended to bring themselves, then that law should govern the validity and

enforceability of the provisions of the collective agreement. This intention may appear by express terms in the contract or may be fairly presumed to have been intended. While the collective agreement itself does not in express terms mention the Railway Labor Act (it was not enacted at that time), all the amendments to it do mention that Act. For instance, in defendant's Exhibit "C" (filed separately) "Schedule of Wages, Conductors," which is the bound volume referred to in the stipulation shown on page 123 of the Transcript, at pages 54, 58, 60, 63 and 70, same being amendments to the collective agreement, the Railway Labor Act is specifically referred to by the contracting parties. At page 54 the concluding language of the amendment is:

> "Section 5. This agreement shall become effective August 1, 1946, and will continue in effect until changed or cancelled as provided for in the Railway Labor Act as amended."

Similar provisions appear following each agreed amendment. Thus the parties themselves construed the contract as referring directly to the Railway Labor Act. By this it appears the parties expressly referred to the law which they, at different times, regarded as applicable to their contract. Besides these express references to the Railway Labor Act, the parties undoubtedly must be presumed to have contracted with reference to that Act, rather than to the law of any particular state. Arkansas has refused to recognize the collective bargaining agreement, because, as it said, it is a unilateral agreement, and is unenforceable. At the time the collective bargaining agreement in this case was entered into (1928), not a single state in which the railroad operated would enforce a unilateral contract. See the following cases:

In Colorado, *Western* v. *Olathe State Bank*, 71 Colo. 102, 204 Pac. 329 (1922);

In Kansas, *Railsback* v. *Raines*, 110 Kan. 220, 203 Pac. 687 (1922);

In Arkansas, *St. Louis, I. M. & S.* v. *Matthews*, 64 Ark. 398, 42 S. W. 903 (1897);

In Louisiana, *Kennon* v. *Brooks Scanlon Co.*, 148 La. 120, 86 So. 675 (1920);

In Texas, *Clegg* v. *Brannon*, 111 Tex. 367, 234 S. W. 1076 (1921);

In Oklahoma, *Emery Bros.* v. *Mutual Benefit Oil Co.*, 73 Okla. 94, 175 Pac. 210 (1918);

In Missouri, *Cole County* v. *Central Missouri Trust Co.*, 302 Mo. 222, 257 S. W. 774 (1924);

In Nebraska, *Central Power Co.* v. *City of Kearney*, (1921) 274 Fed. 253;

In Tennessee, *Canton Cotton Mills* v. *Bowman Overall Co.*, 149 Tenn. 18, 257 S. W. 398 (1924).

In Connecticut, *General Life Ins. Co.* v. *Boseman*, 54 F. 2d 701, affirmed in 301 U. S. 196, 81 L. Ed. 1036, where it is said:

> "The law which will sustain rather than that which will defeat a plain and fair agreement ought, where possible, to be applied."

The parties cannot be presumed to have contemplated a law which would defeat their engagement. As was well said in Oklahoma, in *Santa Fe* v. *Smith*, 132 Pac. 494:

> "* * * the safest rule to arrive at the intention of the parties is that which upholds, rather than that

which defeats, the contract, and the laws of the state under which the contract is valid should be applied."

III.

Another reason why certiorari should be granted is: The state court held the action was based upon plaintiff's contract of hiring in Arkansas. That was an agreement for him to go to work and nothing more. A private matter, while the contract provision breached was contained in the collective agreement, which is a contract of a public nature, for the benefit of all employees coming in that classification.

Individual Hiring Is a Private Matter but a Collective Agreement Is of a Public Nature.

While it has been said that the collective agreement hires no one, yet it declares and defines the rights and duties of those who are hired. As said in the *J. I. Case case, supra,* l. c. 766:

> "There is little left to individual agreement except the act of hiring * * *. After the collective agreement is made, the individual who shall benefit by it is identified by individual hiring."

As soon as hired and by reason of his hiring, the plaintiff came under the collective agreement. If the collective agreement is one contract, and the hiring is another, then the two contracts were merged into one, for in no other way could the collective agreement become a part of his contract of employment.

> "The individual hiring contract is subsidiary to the terms of the trade agreement and may not waive any of its benefits." (*J. I. Case case,* l. c. 767.)

The only thing the hiring contract, designated as the Arkansas contract, had to do with this was to identify plain-

tiff as an employee who is entitled to the rights and privileges set forth in the collective agreement. If some question existed in this case as to whether plaintiff was ever employed by the defendant, or whether he was in fact an employee, then the Arkansas contract probably should be looked to. But that is its extent in this case. It does not appear that there was any attempt to define his rights as such employee at the time he was hired, or that any provisions were made against his discharge or governing his discharge. If there was such attempt it was superceded by the collective agreement.

> "Collective bargaining * * * results in an accord as to the terms which will govern hiring and work and pay in that unit." (*J. I. Case case*, l. c. 766).

This is fully covered by the collective agreement; and it is for a violation of these provisions that plaintiff is suing. The only complaint by plaintiff relates to the violation of the provisions found in the collective agreement which, upon his hiring, became a part of his employment contract (See 88 L. Ed. l. c. 766).

It is this provision against discharge, found only in the collective agreement, which the Supreme Court of Missouri held invalid by reason of the Arkansas decisions to the effect it was a unilateral agreement and unenforceable in that state. The state of Arkansas had nothing to do with provisions found in the collective agreement. It was not made in Arkansas. It so happened the collective agreement was made in Missouri (Tr. 123), but it was entered into, and remained in effect after passage of the Railway Labor Act, to be performed not only in Arkansas, but in all states through which the railroad runs. Otherwise the collective agreement cannot serve the purpose contemplated by the Act. Oddly enough, the Missouri Supreme Court has upheld an iden-

tically worded contract (as to a Missouri employee of the same railroad involved here) against the contention that it was unilateral. *Craig* v. *Thompson*, Mo. Sup., 244 S. W. 2d 37. Doesn't it seem to be the worst kind of folly to hold that the Arkansas courts can declare invalid a portion of this valid (in Missouri) collective agreement? The selection of plaintiff by defendant as one of its employees is a private matter, while the collective agreement is a public relations contract. As said in the *J. I. Case case, supra*, l. c. 767, in speaking of the Board's action on these contracts:

> "The Board asserts a public right vested in it as a public body, charged in the public interest with the duty of preventing unfair labor practices. (Citing) Wherever private contracts conflict with its functions, they obviously must yield or the Act would be reduced to futility."

As said in the *J. I. Case case, supra*, l. c. 768, in speaking of the recognized right of the employee to make a private contract in certain instances:

> "But in so doing the employer may not incidentally exact or obtain any diminution of his own obligation or any increase of those of the employee in matters covered by the collective agreement."

IV.

The collective agreement cannot rightly be ignored as was done by the state court. It was at least a part of his contract of employment. For this reason certiorari should be granted.

In the *J. I. Case* decision, Mr. Justice Jackson says that a collective bargaining contract is not a "contract of employment," but, as said in *Amalgamated Ass'n, etc.*, v.

Pennsylvania Greyhound Line, 192 F. 2d 310, 313, 3rd Cir., in speaking of this statement by Justice Jackson:

> "The factual context of that case necessitated the drawing of a distinction between collective as opposed to individual contracts of employment."

See also *Gatliff Coal Co.* v. *Cox*, 142 F. 2d 876 (6th Cir. 1944); *United Electrical Workers* v. *Miller Metal Products, Inc.*, 215 F. 2d 221 (1954).

In the *Amalgamated Ass'n case, supra,* in speaking of what is meant by the expression "contract of employment," it is said:

> "The union contends that a collective bargaining agreement constitutes merely the frame work within which employment is effectuated, while the narrower business of hiring or firing is the essence of employment itself. If the questioned phrase had read 'contracts of hire,' there might be merit to this contention. But 'contracts of employment' is not a term of art. Its adoption to comprehend collective bargaining agreements is not less familiar in judicial usage than in general parlance." (Citing a number of cases).

As said in *Gatliff Coal Co., supra,* l. c. 880:

> "By itself, the collective agreement constitutes no contract between the individual employee and the company which employs him. It is only an understanding as to terms on which a contract of employment may be satisfactorily made and carried out. It is a mutual, general offer to close by acceptance. When the collective agreement is signed by the individual members of the employer's association and the collective bargaining agent of the labor organization, no other contract being shown, it becomes, until abrogated, the rule of the individual employer and any person who thereafter continues in the employment of the employer or takes new employment with

> him becomes entitled to all the benefits of the collective agreement and incurs all its obligations (Citing). * * * Since appellee was employed by appellant at the time the collective agreement was entered into, and he thereafter continued in the employ of appellant, and there being no showing that he made any individual contract conflicting with the collective agreement, appellee's rights arising out of his employment by appellant and the wages due him, if any, must be measured by the collective agreement."

In the case at bar, the Missouri Supreme Court recognized that the collective agreement is part of plaintiff's contract of employment for breach of which he sues. Otherwise, it would not have been justified in denying recovery because of the unenforceability of one of its provisions, as declared by the Arkansas Supreme Court. If the collective agreement together with his hiring did not constitute his contract of employment, then it makes no difference whether its provisions were valid, or what they were. How, then, can it be said that his contract of employment was an Arkansas contract and governed by Arkansas law?

V.

Another reason why certiorari should be granted is:

The state court's judgment is based on state law, having no fair support, and is inadequate and has no application to the facts of this case.

Section 490.080 *of Missouri Statutes, V. A. M. S.* 1949, provides:

> "Every court of the state shall take judicial notice of the common law and statutes of every state, territory and other jurisdiction of the United States."

This court said, in *Adam* v. *Saenger*, 303 U. S. 59, 64, 82 L. Ed. 649, 652:

> "This court in the exercise of its appellate jurisdiction to review cases coming to it from state courts, takes judicial notice of the law of the several states to the same extent that such notice is taken by the court from which the appeal is taken. Whatever is matter of law in the court appealed from is matter of law here, and whatever was matter of fact in the court appealed from is matter of fact here."

The case was not decided on Missouri law, but on Arkansas law as the Missouri court understood it. Plaintiff claimed all through the case that his rights which defendant violated were federal rights. The Missouri Supreme Court recognized this claim, but denied same, by holding that under the Arkansas law plaintiff had no cause of action. This situation alone justifies granting the writ of certiorari, and gives this court jurisdiction.

Adam v. *Saenger, supra,* l. c. 652.

Thus, we have a federal right denied, not on local law, that is, Missouri law, but Missouri's interpretation of what the Arkansas law is. Since the existence of the federal right turns on the meaning and effect of the Arkansas decisions, the decision of the Missouri court on that point, whether of law or fact, is reviewable here.

Adam v. *Saenger, supra,* l. c. 652, and cases cited.

> "This court * * * cannot * * * accept as final the decision of the state tribunal as to matters alleged to give rise to the asserted federal right. This is especially the case where the decision is rested, not on local law or matters of fact of the usual type, which are peculiarly within the cognizance of the local court, but upon the law of another state, as readily determined here as in a state court."

Adam v. *Saenger, supra,* l. c. 653, and cases cited.

This court is just as good a judge of what the Arkansas law is, as the Missouri court. And if it appears that a

federal right has been denied or defeated in substance and effect by interposing a non-federal ground of decision, "having no fair support," or if it appears the state court rested its judgment on an "inadequate non-federal ground," this court will grant the writ.

Ancient Egyptian Arabic Order N. M. S. v. *Michaux*, 279 U. S. 737, 746, 73 L. Ed. 931.

Indiana ex rel. Anderson v. *Brand*, 303 U. S. 95, 82 L. Ed. 685, 690.

The two Arkansas cases on which the Missouri Supreme Court bases its conclusion are *Railroad* v. *Matthews*, 64 Ark. 398, 42 S. W. 902; and *Petty* v. *Railroad*, 205 Ark. 990, 167 S. W. 2d 895. The opinion also refers to two federal court cases announcing their conclusion of the Arkansas law. These Arkansas cases denied recovery because the provision in the union contract against discharge was unilateral—lacked mutuality—because the employee had not promised or agreed to work for the company for a definite length of time. That court applied the ancient doctrine of mutuality in bilateral contracts to a collective agreement between the carrier and the union, and extended that mutuality to the employee who was not a party to the contract, but merely a third party beneficiary. The doctrine of mutuality has never applied to third party beneficiary contracts, and in the very nature of things, cannot apply.

The Missouri court accepted this misconception of the law. Hence, if it can be said that plaintiff's recovery was defeated on non-federal grounds, it can most certainly be said that they "have no fair support" and are inadequate. Two swallows do not make a summer. If, as we contend, the doctrine of mutuality in contracts, has no application to third party beneficiary contracts, then the Arkansas court is wrong and the Missouri court was not justified in

following its decisions. And this court need not accept as final Missouri's interpretation of the Arkansas law. This situation illustrates the folly of the holding that before a plaintiff can recover he must have a cause of action recognized by the state in which he sues regardless of violated federal rights created by federal law.

VI.

Another reason for certiorari is: The law of mutuality in contracts has no application to third party beneficiary contracts.

The view that an individual employee may by action enforce the provisions, made for his benefit, of a collective agreement between the carrier and his union ordinarily rests on the ground that such employee is a third party beneficiary.

18 *A. L. R.* 2d 361.

The doctrine of mutuality in contracts has no application to third party beneficiary contracts such as the one here involved. Plaintiff was merely an employee and as soon as the collective agreement was made it became a part of his contract of employment and he thereafter worked under this collective agreement, and not under his original contract of hiring. He may or may not have known that such a contract was in existence. He was represented in its making by a representative selected by the employees. It was not even necessary for him to know about the contract or its provisions at the time it was made; neither was it necessary for him to make any promises to his employer, in order to validate the contract. If mutuality was required in making the contract, it was mutuality between the employer and the union.

As said in 81 *A. L. R.* 1286, note, in speaking of the rights of a third party beneficiary:

> "It is not essential in order to enable a third person to recover on a contract made for his benefit, that he knew of the contract at the time it was made * * *. It is enough that he knows of it when he begins his action."

In the very nature of things there can be no mutuality in third party agreements. Such agreements as here apply to all employees within the class. When hired and he goes to work, the employee automatically comes under the agreement and he becomes entitled to all the rights and privileges granted in the collective agreement. He need promise nothing to become an employee; all he needs to do is to go to work; and when he does, he impliedly consents to the terms of the collective agreement.

The doctrine of mutuality in contracts is limited to the parties to the agreement, and does not extend to those persons for whose benefit the contract was made and who are not parties to it.

81 *A. L. R.* 1279 and 1286, note.

The doctrine is well stated in *Coleman Hotel Company* v. *Crawford*, 3 S. W. 2d 1109, 1111, Texas, as follows:

> "Our courts have frequently upheld contracts between parties as based upon a valid consideration which are made for the benefit of a third party, even though no consideration moves from such third party (Citing). Neither is it essential to the validity of such a contract that the same be accepted by the party for whose benefit it is made." (Citing).
>
> *Crone* v. *Stinde*, 156 Mo. 262, 55 S. W. 863.
>
> *Beattie Mfg. Co.* v. *Clark*, 298 Mo. 98, 106 S. W. 29.
>
> *Weber Engine Co.* v. *Lehrach*, 262 S. W. 457 (Mo.).

Could it be logically contended that an employee could not collect the wages the employer, by his collective agreement, had agreed to pay, because such employee had not specifically agreed to work for that wage? The same is true of any provision of a collective agreement.

As said by the Court of Appeals of Texas in *Harper* v. *Local Union L. B. E. W.*, 48 S. W. 2d 1033:

> "While it is true that there is no express agreement on the part of the union to furnish labor at the prices and under the terms and conditions prescribed in the contract, its very purpose and object was to prescribe terms under which the members of the union would work and the contractors would employ. It was, therefore, we think, a necessarily implied term of the agreement that the union, its officers and members, would collectively abide by the terms of the agreement, and would not collectively or as an organization exercise any right or do any act it or they might otherwise lawfully exercise or do, which was in conflict with any of the terms of the agreement; and that the union would enforce the contract to the extent of its powers over its members under the constitution and by-laws."

And by the New York court in *Maisel* v. *Sigman,* 205 N. Y. S. 807, in speaking of the mutuality of such agreement:

> "Such a contract implies an agreement on the part of the workers, made through the union as their agent, that they will render their services upon the terms set forth in the agreement during the term thereof."

Mutual promises, or mutual agreements, are only a phase of the consideration of a contract. The doctrine of mutuality in contracts has become a thing of the past.

In the recent work of the late Professor Grismore, of the University of Michigan "*Grismore on Contracts,*" Sec. 68, Page 121, it is said:

"It is said that the 'doctrine of mutuality of obligation' not only is not supported by most of the actual decisions but has outlived any possible period of usefulness. Since it is so likely to be misunderstood, the time has come when it should be frankly disavowed."

VII.

Another reason why certiorari should issue is the present contrariety of opinions of this court—that is, the apparent conflict between the *Moore case*, 312 U. S. 630, 85 L. Ed. 1089, and the *Koppal case*, 345 U. S. 653, 97 L. Ed. 1325. It is our contention that the Koppal case is not sound law. This court said too much in the Koppal case when it placed the right to recover in this kind of case on the status of the state law in which the case is tried.

The Moore case holds in effect that recovery may be had in a wrongful discharge case regardless of any state law on the subject, while the Koppal case holds that recovery may be had "if the state court (in which suit is filed) recognized such a claim."

The Koppal case allowed recovery where the state court permitted it, and denied recovery where the state court denied it. Under the Koppal case recovery is permitted or denied in accordance with state law. This defeats the very purpose of the Railway Labor Act, and creates confusion. Certiorari should be granted in the case at bar and this question should be settled.

The only distinguishing feature we can see between the Moore case and the Koppal case is that in the Koppal case the question considered was largely procedural rather than substantive. The validity of the collective agreement, and legality of its provisions, as in the case at bar, are certainly substantive. It has no reference to procedural matters. The state law strikes down one of the

most important provisions of the collective agreement, by holding that provision to be unilateral and void.

Respectfully submitted,

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